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Derechos en crisis: Central American asylum claims in the age of authoritarian neoliberalism

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ABSTRACT

Drawing upon the insights of Giorgio Agamben and Antonio Gramsci coupled with ethnographic research conducted in Texas, this paper discusses how the Obama Administration sought to impose a *state of exception* on Central American refugees by attempting to suspend substantive refugee protections enshrined in international law, in the name of responding to a refugee crisis. The paper also illustrates how these efforts to create a state of exception have been challenged and contested by subaltern actors, in this case, a group of women and children hunger strikers and their activist allies in Texas. The article makes the case that these hunger strikers are part of an emergent Mesoamerican refugee movement that has formed within the interstices of the homeland security state. This speaks not to a “refugee crisis,” as many have posited, but rather to the crisis of rights regimes of liberal democratic states writ large in the wake of massive displacements of people from Central America, a region racked by almost 40 years of neoliberal policies, US militarism, and failed zero-tolerance security paradigms.

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“I have been here four months without medicine for my asthma,” said Zulma, a 56-year-old grandmother of four from El Salvador, as her attorney and I spoke with her in a visiting room in a Texas detention center. She had been detained for four months after she turned herself into the US Customs and Border Protection (CBP) to ask for asylum. Zulma applied for asylum because gang members had pistol-whipped her for defending her grandson from forced recruitment in Eastern El Salvador (Author Field Notes). The detention center where I visited her is one of the many public and private detention centers in Texas, where the US government, under the Obama Administration, was detaining the majority of the Central American women and children who entered in the summer of 2014.

That summer was a watershed moment in immigration and refugee politics. A total of 68,541 unaccompanied minor children and nearly 68,445 family units, mostly from Central America and Mexico, were apprehended by, or turned themselves in to, the CBP in the Rio Grande Valley Border sector in South Texas (USCPB 2016). While the media spectacle around the Central American families coming into the United States has become less dramatic since 2014, the numbers of people coming through 2016 had

not significantly declined. According to the data obtained from the CBP, over 130,000 people – mostly unaccompanied minors and women with children from Central America – crossed to the United States in 2016. Most of those who have come since the summer of 2014, including Zulma, have applied for asylum in the United States, based on fear of persecution on any one of five protected grounds designated by the 1951 Convention Relating to the Status of Refugees (UNHCR 2016) and the 1967 Protocol.¹ Given the reality that most Central American are fleeing for their lives in the face of some of the highest femicide and homicide rates in the world due to endemic gang, police, and domestic violence (Small Arms Survey 2011), one would expect to find higher grant rates among those who apply for asylum. Yet in 2015, out of the 11,190 asylum applications received from Salvadoran nationals, only 305 were granted. In other words, Salvadorans who came after the “surge” of 2014 had only a 2% percent chance of winning their case that year. Similar numbers hold for Guatemalans and Hondurans, whom were granted only 3% and 2% of cases, respectively, in 2015.

Some would expect more of these national to be granted relief under the Refugee Convention. The 1951 Convention and 1967 Protocol are meant to be the cornerstones of the modern-day system for refugee protection, shaping asylum policy in the United States and around the globe. An introductory note to the Convention written by the UN High Commissioner on the Status of Refugees, written on the 60th anniversary of the document, notes that the convention is “underpinned by a number of fundamental principles, most notably nondiscrimination, non-penalization and non-refoulement. Convention provisions, for example, are to be applied without discrimination as to race, religion or country of origin” (UN High Commissioner 2010). For instance, Article 31 of the Convention calls on states not to impose penalties or punishment on refugees for breaking the law in order to escape their persecutors. Article 32 calls on states to guarantee due process for refugees, while Article 33 prohibits deportation to a region where the person will face repression on account of race, religious, nationally, political opinion, or social group (UN High Commissioner 2010). In spite of these guidelines, the Obama Administration did not grant migrants refuge or international protection under the Convention or Protocol; instead, the US government detained Central American women and children in detention centers, and even created new makeshift centers to hold asylum seekers as they awaited their turn on the “rocket docket” – what immigration lawyers called the rapid deportation proceedings put in place to manage the “crisis” (Hernandez 2015). As of April 2018, the Trump Administration issued a memo asking the Secretary of Defense to explore military facilities to detain asylum seekers approaching the border (Davis 2018).

Moving beyond the narrow discourses of a “refugee crisis” and the journalistic analyses of the “surge” of 2014, the present article seeks to theorize the state and civil society response to ongoing Central American refugee flows since 2014. Rather than a refugee crisis, I theorize the state response to the Central American refugees as being symptomatic of a deeper democratic crisis facing the United States in the face of hundreds of thousands of forced migrants displaced by the legacy of military interventions and the failure of US-backed neoliberal security paradigms in Central America (Zilberg 2011). Theoretically, the article draws on the insights of Antonio Gramsci and Giorgio Agamben, as well as more contemporary literature on migration control and refugee politics. Methodologically, it builds from the author’s ongoing critical ethnographic project and from interviews with immigration attorneys and refugee activists in Texas, the epicenter of migrant detention

and ground zero of the so-called “surge” in Central American asylum seekers between 2014 and 2016.

This project, more than a traditional ethnography where the detached observer sits back and “observes,” used the concept of *accompaniment* to guide research. The accompaniment is a methodology inspired by liberation theology’s concept of the “preference for the poor.” The idea is that rather than simply producing research that serves the interests of academic disciplines, one conducts research that is engaged in community and that actively assists people in navigating powerful institutions, juridical processes, or any other asymmetrical situation that they may face. The method is heavily used in Latin America and more recently by critical scholars in the United States (Tomlinson and Lipsitz 2013). Thus as part of this ethnographic research project, a group of research assistants and I accompanied immigration attorneys and asylum applicants to eight immigration court hearings in Houston, San Antonio, and Pearsall, Texas. We accompanied activists to meetings and events, including protests. We also accompanied attorneys and their clients as they went to immigration court and as they visited their clients in various types of detention facilities. Given the nature of working with vulnerable populations, especially in these authoritarian times, I do not use the actual names of the asylum seekers, nor do I cite field notes with the date, time, or location of the observations.

My engagement with theory and the on-the-ground politics of the detainability, (il)legality, and resistance of Central American asylum seekers in Texas leads me to argue that rather than having a “refugee crisis,” as many have argued, what we have is a *crisis of the refugee rights regime* in the face of hundreds of thousands of people that have been displaced by US-backed policies in the region. When presented with the body of the racialized and gendered Central American asylum seeker, the asylum-detention regime attempts to impose a state of exception, in which it practically suspends the contemporary rights regimes normatively guided by the Refugee Convention and Protocol, as well as the basic tenants of liberal democracy, in order to deny asylum applications and to punish asylum seekers from the region. While bringing relief to a fraction of the adults who present their cases before the system, the asylum-detention regime primarily functions as a site for the legal production of migrant illegality, detainability, and deportability (De Genova 2016) and not as a means for fairly and justly adjudicating claims of Central Americans. Under this system, refugees are put in a semi-state of exception when they are detained under unreasonable “bail” amounts, denied their asylum claims in the vast majority of cases, and ultimately rendered deportable. Indeed, they are denied recognition as refugees and are deemed “illegal immigrants” in state and popular discourse. This allows for them to be denied the most basic rights of due process: the right to see a judge, the right to an attorney, *habeas corpus*, and freedom of speech and association.

In her classic text, *The Origins of Totalitarianism* (1951), Hannah Arendt described how refugees displaced by World War II lost their very *right to have rights* in the face of an overwhelmed asylum regime. Similarly, as the US government holds Central American asylum seekers in detention while empowering Department of Homeland Security (DHS) attorneys to deny the vast majority of claims, no matter how severe, it attempts to revoke Central Americans’ right to have rights. By simply refusing to recognize the Central American women and children as refugees and by denying their claims to asylum at such a high rate, the state has, for all intents and purposes, suspended the

refugee protections and civil liberties that one would expect to take for granted in so-called advanced liberal democracies, all in the name of upholding the law.

Although this paper argues that the Obama Administration sought to impose a state of exception, it also argues that it never imposed a complete state of exception. Rather, I write about a *semi*-state of exception, or *efforts* to impose a state of exception, because subaltern forces and their allies often managed to fragment and resist these efforts. As I will illustrate below, using the case of the hunger strike by women and children in the Karnes City Family Detention Center in 2015, the organizing efforts of migrants/refugees and their allies have been effective in advancing the rights of Central American refugees and detainees in the face of efforts to impose a state of exception in the asylum-detention regime.² More than simply being an important act of resistance, the radical organizing of these women and children represents the agency of subaltern actors to alter state policy and practices in a complex, dynamic, and contradictory struggle over rights in authoritarian times.

To advance the argument above, I will first provide a theoretical discussion of Agamben's state of exception, bare life, and sovereignty and Gramsci's concepts of the state and the subaltern to consider how they shed light on the struggle of Central American migrants and asylum seekers. Second, I will briefly discuss the history of refugee policy in the 1980s and elaborate on the important victories that come out of the refugee movement in the 1990s and 2000s. Then I will discuss how these important victories were undermined by the response to the "surge" of 2014, in which the Obama Administration sought to expand the asylum-detention regime by bringing back family detention and attempting to impose a state of exception. I will elaborate on how efforts to create a state of exception are always tentative and incomplete, and discuss how the hunger-work strike of 2015, among detained mothers and their children in the Karnes City Detention Center, represented an important challenge to this state of exception, thus rending it incomplete and subject to change. Finally, I will consider the Trump Presidency's actions in the realm of asylum and detention policy, and discuss what the detention of asylum seekers tells us about the contemporary politics of race and liberal democracy.

Agamben's state of exception, the asylum-detention regime, and subaltern struggles

Political theorists and critical migration studies scholars such as Katy Arnold (2011), Paul Apostolidis (2010), and De Genova and Peutz (2010) have used the work of Giorgio Agamben to understand the politics of immigration policy and migration control more broadly. Expanding on this work, I seek to use some of Agamben's theoretical insights to explain how the United States government is treating Central American refugees through an engagement with his theoretical concepts of state of exception, bare life and sovereignty.

In his most well-known book, *Homo Saucer*, Agamben (1998) elaborates on the state of exception, a political condition where the juridical order and the very right to have rights are suspended, leaving a space where one is reduced to bare life. Bare life is the legal status of nonbeing, and subsequent exposure to forms of state violence that could not be applied to those within the realm of state protections. Thus, *bare life* defines a subject that is contradictorily produced by modern law, yet outside of the law, and hence outside of the

purview of human and constitutional rights. In Agamben's framework, this means that "the normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that while ignoring international law externally and producing a permanent state of exception internally – nevertheless still claims to be applying the law" (2005). In other words, this is a condition in which the state systematically violates the law in the name of upholding the law.

Inspired by the writings of Hannah Arendt and Michel Foucault, Agamben argues the central problem of the state of exception and bare life is sovereignty (Agamben 1979, 2005). The sovereign, for Agamben, is any state that gets to decide who gets reduced to bare life and who gets the right to have rights. In his book *Remnants of Auschwitz* (1999), Agamben explains how, in its more extreme form, sovereignty could produce the Nazi concentration camp and similar conditions. The camp is of concern for Agamben not just because of the atrocities that were committed there, but because it represents the physical commitment of the state to creating permanent states of exception where it literally decides who lives and who dies. Many would be quick to argue that one could not compare concentration camps to migrant detention centers, and this is true in terms of degrees of violence. But Agamben is not only concerned with the Nazis; he is equally concerned with what he sees as a permanent feature of modern states, that is, a commitment to building permanent camp-like conditions where the state of exception is the rule, even when not brought to the level of genocidal violence. He warns that as long as the state of exception is forged by states, then the *potential* for such violence to become genocidal is always there, even in the most modern liberal democratic state. Agamben's primary concern is that the state of exception has moved from being something reserved for emergencies to becoming the normative function of modern democracies.

These concepts in Agamben's work are useful for illustrating how the United States suspends international law and basic civil liberties for Central American asylum seekers and holds them in detention, in defiance of the Refugee Convention, which mandates that no state shall detain or punish asylum seekers, not even for breaking the law in order to escape their persecutors. In other words, asylum seekers are being punished for breaking the law (through their illegal entry into the United States), in direct contradiction to the specifications of the modern-day system of refugee protections.

Although Agamben's state of exception is an important conceptual tool for understanding how states seek to control Central American refugee flows, it is limited for thinking about the contradictory nature of the state and the agency of subaltern groups to resist and alter their conditions. Theorist Paul Apostolidis recognizes that "popular political formations of movements both define and unsettle and determine the social contexts that resemble spaces of exception" (Apostolidis 2010, 226). He adds that Agamben's framework "recapitulates the racial logic by which immigrants are continually rendered passive objects of power, rather than active subjects who help make power what it is today and can unmake it as well" (226). The other problem with Agamben's theory of the state of exception is that it leaves us with an understanding of the sovereign that seems transhistorical and monolithic, without accounting for the fissures in even the most despotic powers. In order to find a more nuanced theory of the state and of migrant/refugee resistance, I turn to the theoretical insights of Antonio Gramsci.³

Gramsci (1971) allows us to see how the modern asylum-detention regime is not stagnant or homogenous. Despite attempts to create a state of exception, there exists forces

outside of the state, such as subaltern social movements, radical attorneys, detainees, and others, that resist, and thus create fissures in, state power. This is also the case within the state; there might be relatively moderate or fair immigration judges, more sympathetic asylum officers, or whistleblowers within the detention regime, for instance, who seek to uphold basic elements of the Refugee Convention and of liberal democracy. Though such forces are few and far between, they tend to fragment the state of exception within the asylum-detention regime.

From this perspective, the *asylum-detention regime* refers to a constellation of state institutions within the homeland security state specifically in charge of regulating the process of asylum adjudication, detention, and refugee resettlement. Like the homeland security state, it cannot be understood as simply the official institutions of the state, but rather it has deep roots in civil society and in the United States' history of racial capitalism. Some of the main institutional state actors that regulate the asylum process are ICE, the Executive Office for Immigration Review (EOIR), the Justice Department's immigration courtrooms, the Asylum Officer Corps, and the Office of Refugee Resettlement. However, the asylum-detention regime also includes private prison corporations, such as GEO Inc. and Corrections Corporation of America (now called Core-Civic), and civil society-based organizations, including the labor unions for many of the enforcement agencies and think tanks such as the Center for Immigration Studies. As we will see in the following section, although it is complex, powerful, and sophisticated, the asylum-detention regime is not immune to pressure from subaltern social movements.

The asylum-detention regime is a product of struggle between groups with competing interests and values, hence it could be changed by social movements. Within both the apparatus of political society (government) and civil society, groups representing competing interests engage in struggle to shape the direction of state policy, state practice and discourse, thus creating possibilities for transformation from above as well as from below. Indeed, it is within the interstices of the asylum-detention regime that Central American asylum seekers and their allies in Texas led the fiercest struggles to win their asylum cases, liberate themselves from detention, and claim the very right to have rights.

Rather than conceive of a totalizing state of exception in the strict sense put forth by Agamben, I see instead a semi-state of exception, in which the subaltern – those who Gramsci saw as being on the margins of the nation state and of modern rights regimes – do have a fighting chance to win their cases, resist their detention, and fight for their rights. The category of subaltern is especially useful because it is an intersectional term that Gramsci used to describe people living in multiple forms of marginality in Southern Italy and around the globe. Like most of his concepts, Gramsci uses the term in multiple ways, referring to class, but also race/ethnicity, religion, and geography and liminal political status (Green 2002). Central Americans are subaltern refugees, and like other subalterns before the asylum-detention regime such as Haitians and Mexicans, their struggles are not captured solely by their class position. Rather, their chances of being granted or rejected asylum are shaped by the intersection of their race, class, gender, and sexuality and by the complex history of US foreign policy and military interventions.⁴ This is most evident in the case of the women and children who were detained in Karnes City and in other family and women's detention centers in Texas: they were not only detained migrants and refugees, but they were Central American women and children, whose social location in the racial and gendered hierarchy of power played out in the

courtroom, in detention, even in interactions with their middle-class, white, Latino, and/or male allies.

The surge of 2014, family detention, and the hunger-work strike in Texas

Though the focus on this article is on the state response to the surge of 2014 and Central American refugee activism, it is important to recognize that there were problems within the asylum-detention regime in the United States well before the summer of 2014. Going back almost 40 years now, the United States denied the majority of Central American claims that came before its courts in the 1980s (Abrego 2017), and it has denied and continues to deny most claims for Haitians (Pierre 2017). In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act became a central cog in the construction of the present asylum-detention regime, and the homeland security state more broadly (Arnold 2011). This law expanded the grounds for deportation and enforced these new regulations retroactively, created a framework for cooperation among local police and federal immigration agencies, called for the mandatory detention of deportable migrants and asylum seekers, gave migrants only one year to apply for asylum upon entering the United States and barred asylum seekers who missed the deadline, and created the expedited removal category, which essentially takes away the right to see a judge for those apprehended near the border. Legal scholars of asylum adjudications suggest that as many as 800,000 people have been prevented from applying for asylum because of the one-year bar alone (Schoenholtz, Schrag, and Ramji-Nogales 2014). In essence, the 1996 immigration laws laid the framework for a more robust and repressive migration control apparatus that moves toward a state of exception by denying basic due process rights to migrants and refugees.

Though the 1996 laws came into effect in 1997, the implementation of many of the most repressive provisions was not activated until after 9/11, when President George W. Bush and his Attorney General John Ashcroft issued memos to begin to detain asylum seekers and to expand cooperation agreements between local and federal immigration authorities. Detention and cooperation became some of the major tools to facilitate denying the vast majority of Central American asylum claims. Under the framework of the 1996 law implemented in the post-9/11 world, private prison companies ran for-profit detention centers, congressional action imposed prohibitive barriers on winning asylum and mandated that 34,000 people be maintained in detention daily, and several dozen detainees died while held in immigration detention centers – all of this before the 2014 “surge.”

As terrible as conditions were before 2014, however, most asylum seekers were not being mandatorily held in detention, and the government under President Obama had generally discontinued the detention of children. Although the Bush administration began the practice of detaining mothers and their children at the US–Mexico border in 2005, Texas activists initiated a four-year fight and persuaded the Obama administration to end child detention in 2009, with the exception of one facility in Berks, Pennsylvania (Libal 2016). The Obama administration’s general position, before the summer of 2014, was to respect the guidelines of the 1997 *Flores v. Meese Settlement*. The *Flores Settlement* favored the “release of children” to family members or foster homes and stated that, in the event that the government might have to detain children, it would do so under the least

restrictive conditions possible, and children would be kept away from unrelated adults and provided sufficient medical and educational facilities (Hylton 2015a). The Flores Settlement had been made possible by a class action suit filed by the Center for Constitutional Rights in Los Angeles in the 1990s, and represented a protection for present refugees made possible by the efforts of Haitian and Central American refugee movements in earlier decades.

Prior to the summer of 2014, adult asylum seekers were also far less likely to be placed in detention. Upon arriving, asylum seekers would first undergo a Credible Fear Interview to determine whether their claim was credible enough for them to go before a US Immigration Judge, and in front of a judge, they would at least have a fighting chance of being granted asylum or some other form of relief from deportation. Unless declared a flight risk, most asylum seekers were allowed to stay with family or friends until the date of their merits hearing, which might be scheduled several months or years down the road depending on where the person entered the country.

State practices and policies changed after the “surge.” The Obama administration began detaining as many asylum seekers from Central America as detention centers could possibly hold, with the goal of deterring other asylum seekers from attempting to enter the country. The administration quickly designated the large numbers of women and children entering through Texas as a national security threat. This designation worked as a discursive tactic to try to put women and children asylum seekers in a state of exception, in which the rights and practices enshrined in the 1951 Convention, and even in the United States Constitution, could be suspended in practice. Rather than being released, women and children were now primarily placed in one of three new family detention centers. The first makeshift detention center was created out of a federal law enforcement training center in Artesia, New Mexico, about 177 miles northwest of Las Cruces. The second and third family detention centers were opened in Karnes and Dilly, Texas, each located about 70 miles east and south, respectively, from San Antonio. As noted by respected immigration attorney Barbara Hines, the centers were intentionally placed far from major urban hubs in order to isolate detainees from friends, family, pro-bono legal services, or activist groups that might oppose detention (Hines 2016). Finally, the Obama administration additionally instituted a no-bond policy for Central American asylum seekers who entered in the summer of 2014; they were now required to be held in detention until their cases could be adjudicated, which might be several months or years.

To justify its policy of uniformly denying bond to the House Committee on Homeland Security, the government cited two written affidavits by ICE agents invoking their academic credentials, as well as the written testimony of Department of Homeland Security Secretary Jeh Johnson (Immigration and Customs Enforcement 2014). These principal documents were submitted to every single bond hearing as evidence that prolonged detention was legally justified. Again, before the summer of 2014, it had been standard practice to release on bond anyone who was not considered a flight risk.⁵ In the first of these affidavits, Philip T. Miller, the assistant director of field operations for ICE’s Enforcement and Removal Operations, argued that mass migration had overwhelmed the DHS and diverted resources from its core mission, and that therefore Central American women and children were a national security threat. In order to curb this “threat,” he advocated using prolonged detention to deter “illegal immigration.” Part of Miller’s (2014) declaration stated:

According to debriefings of Guatemalan, Honduran, and Salvadoran detainees, the high probability of a prompt release coupled with the likelihood of low or no bond, is among the reasons they are coming to the United States. I have concluded that implementation of a “no bond” or “high bond” policy would significantly reduce the unlawful mass migration of Guatemalans, Hondurans, and Salvadorans. (Miller 2014)

Miller, who holds a BA and MA in political science, also cited the Latin America Public Opinion Project’s Americas Barometer, based out of Vanderbilt University, to bolster the Obama Administration’s claim that asylum seekers from the Northern Triangle come to the United States largely to join family networks. In reality, most of the Central American women and children arriving in 2014 were fleeing gender and gang violence, which should have qualified them for asylum or for other types of relief from deportation. Yet the documents submitted by the government were carefully written to deny the possibility that these particular migrants could be granted asylum or considered refugees. Miller’s declaration is just one of many artifacts produced by organic intellectuals of the homeland security state to attempt to justify a state of exception and to suspend international protection for Mesoamerican asylum seekers. In this semi-state of exception, which marked women and children as a national security threat and denied them bond, several thousand Central American asylum seekers were detained for prolonged periods of time, to the benefit of private detention centers.

When I visited Texas detention centers with immigration attorneys working the detained docket, I spoke to many asylum seekers in detention and kept contact with many after they were no longer detained. Former detainees spoke of humiliation by guards, sexual harassment, rotting food, and inadequate medical treatment. One woman who was released from detention said that she was forced to stand in a single-file line in the Texas sun for hours. Other women said ICE officers tried to persuade them to sign their own deportation orders. Many women stated that their children became sick from eating rotten food. Some children went days without eating the food provided by the private prison company, GEO, because it was making them sick. Mothers and children suffered the most when they did not have friends or family who could give them money to purchase food and drinks at the commissary.

Attorneys and advocates described detainees’ mental and physical health severely deteriorating. Mothers spoke about their children contemplating suicide by jumping off the second-floor balcony. Teenage girls were especially affected by the conditions of prolonged detention, and several were put on suicide watch. Olivia Lopez, a Texas-based social worker who worked at the Karnes City Detention Center, testified before Congress that she saw people with serious mental health issues being denied sufficient treatment, and that her superiors at GEO instructed her to misdiagnose detainees and to simply minimize the effects of detention on people’s mental health (Ordoñez 2015). The lack of medical treatment was a constant problem. Because the private prison corporations running the centers always attempt to cut costs to maximize profits, detainees are often denied sufficient treatment. Attorneys leaked news of a three-year-old girl whose health deteriorated over several months because the mother could not receive adequate treatment for her daughter, after several documented attempts to do so.

Migrant testimonies were corroborated by scholarly research. Sociologist Nestor Rodriguez wrote an expert affidavit countering the arguments made by the DHS. Rodriguez, who is a senior scholar with 30 years’ experience studying migration from Central

America to the United States, methodically disarticulated the argument advanced by ICE that the Obama Administration's policies had inspired mass migration. Political scientist Tom K. Wong also contributed a powerful report, supported by statistical analysis, suggesting that unaccompanied youth were coming to the United States to flee violence, not to reap the benefits of deferred action, as hypothesized by the DHS and their civil society-based supporters such as the Center for Immigration Studies (Wong 2014). These scholars questioned the facts used by the US government to justify their tactics. But facts are not important to the homeland security state's ever evasive and dynamic strategy to impose a state of exception on migrants and refugees. If the state has learned anything in its thirty years of managing refugee flows, it is that detaining asylum seekers in harsh conditions affects society at large. Migrant detention was meant to educate and mold would-be refugees such that they would not apply for status, would not come to the United States, and in many cases would sign their own deportation orders, or simply come as undocumented immigrants rather than as asylum seekers who ostensibly have rights.

In short, the Obama administration sought to detain and punish the Central American families who came in 2013–2014, and invoked the language of “crisis” and “surge” to put families in a state of semi-rightlessness. Detainees were denied the most basic rights and fair treatment that one would expect to see in an advanced liberal democracy. They did not have court-appointed attorneys and they were not being held for breaking the law, but were instead held on administrative grounds. And in Texas, immediately following the summer of 2014, Central American women and children were being held without bond in private for-profit detention centers. The objective of the US government's strategy was to create a state of exception for the detention of refugee families and to have a deterring effect on future flows. In other words, the strategy was to send a message loud and clear: the US government detains and punishes those brown bodies from Central America, like Zulma, who seek to apply for asylum at its borders.

The 2014 hunger-work strike and its aftermath

For Agamben, the state of exception is an omnipresent and omnipotent force, and he does not provide a political roadmap or strategy for resisting it. In the Gramscian tradition, however, power can be contested by subaltern forces and their allies, even among the most despotic regimes. Despite government efforts to put asylum seekers in a state of exception, they have been anything but passive. Since the media first began to speak about the “refugee crisis,” Latino communities have been mobilizing to defend asylum seekers' rights. There was tremendous support for families in Murrieta, California, and South Texas cities, such as Brownsville and McAllen, during the summer of 2014. The organization La Unión del Pueblo Entero (LUPE) organized toy and clothing drives to support the families in Brownsville, for instance. On March 21 2014, known as the Day of Monsignor Óscar Romero, the Alliance for Human Rights and Refugee Families organized simultaneous protests in support of refugee rights and detained families in Los Angeles, Austin, and New York City that drew hundreds of people. Meanwhile, the organization Texas United for Families (TUFF) reactivated the same coalition that helped to end the first family detention policies in 2009 (Libal 2016). The Obama administration's family

detention policies were starting to gain the attention of the public, and a movement was brewing at the national level.

The most significant action of 2014, however, was the Easter hunger-work strike carried out by detained women at the Karnes City Detention Center. As a form of nonviolent protest, strikers refused to eat, work, send their children to classes, or use any services in the detention center. They released a document signed by 74 women who were detained with their children and who demanded to be released: “[D]uring this [time], no mother will work in the detention center, nor will we send our children to school, not will we use any services here, until we are heard and approved: we want our FREEDOM” (Bogado 2015). The document went viral on social media and in activist circles, and major media such as the *Guardian* and the *New York Times* picked up the story. The document also rebutted the absurd argument that asylum seekers and their children were a threat to US national security and denounced abuse in the private prisons.

The hunger-work strike was a blow to the asylum-detention regime; hence, ICE and GEO did their best to suffocate the strike and to silence the women through the most insidious and authoritarian set of tactics. First, they began a campaign to ban legal aid workers who were assisting detainees. One Austin legal assistant, for instance, was banned from entering the detention center after writing an article in which she detailed the abuses that were taking place at Karnes. Weeks later, another worker with the legal nonprofit RAICES was banned from entering the same facility. Since the detained women planned the mass protest themselves, ICE and GEO did their best to intimidate them and their visitors by placing a metal detector in the visitation room and implementing an array of other tactics to prevent free expression.

To punish the protesters, ICE placed women and children in isolated cells during Holy Week. Strikers were placed in dark rooms with tiny sinks so small that those inside had to drink water by cupping their hands. They put one woman and her 11-year-old daughter in the dark room, and placed other mothers and children in isolated cells, for the Easter mass and protest.

As if this form of punishment were not horrific enough, ICE and GEO took their repression against the women at Karnes to a new level by threatening to take their children away and place them in government foster homes. Under a sadistic logic, ICE argued to the *New York Times* that anyone who goes on strike is putting their children in danger and therefore will be considered an unfit parent (Hylton 2015b). Being declared an unfit parent sets up the legal groundwork for another type of bare life, in which the subject is stripped of the most basic right of having their children with them. The threat of taking away detainees’ children as punishment for their activism essentially sought to extend the state of exception to include the suspension of parental rights.

The 80 women who struck were not easily broken. On April 23, 2014, they denounced the repression against them and, with the help of their legal allies, filed a lawsuit, *Pineda Cruz v. Thompson*, in a west Texas District Court. The suit brought charges against Immigration and Customs Enforcement, the Department of Homeland Security and the GEO Group Incorporated for violating their First Amendment Rights during the hunger-work strike. The women denounced the retaliation against them, including the use of isolation cells for their participation in various strikes (Civil Rights Litigation Clearinghouse 2015). The lawsuit on behalf of the women was later abandoned, after Texas Judge Xavier Rodriguez aggressively asserted that the women essentially had no rights because they were in

immigration detention. The District Court thus sought to argue that the women did not have the right to association or speech and attempted to keep the women in a state of exception that suspended the specifications of the Refugee Convention. Rather than being a site of neutrality and justice, the courts were harnessed to become another trench of the homeland security state in its war of position against Central American refugees.

Despite the counteroffensive by ICE, the DHS, GEO, and the courts, the women's strike brought national attention to the issue. The momentum against family detention was also used by TUFF to call for a national demonstration in May of 2014. At the demonstration, thousands of people from all over Texas and all over the country gathered to protest a detention facility that was renamed the South Texas Family Residential Center, located in Dilly, Texas. The protest represented an important moment in the formation of a Mesoamerican refugee movement that is broader than the "women and children" tropes that typically define family detention struggles. I recall Honduran, Salvadoran, and Mexican activists, including former detainees and the children of detainees, sharing their stories with protesters and with each other. In fact, a group of Honduran migrants and refugees who have lost limbs from La Bestia – the train that Central American migrants frequently use to clandestinely cross through Mexico – headed the march with prosthetic legs and crutches.

The hunger-work strike and the march against family detention came on the heels of a July victory for the refugee rights movement. Federal Judge Dolly Gee in California found that aspects of the government's family detention policies had violated the 1997 Flores Settlement. The California judge argued that private prison corporations are not licensed to hold children in detention and placed an injunction on the expansion of family detention practices. Attorney Peter Schey, of the Center for Human and Constitutional Rights, explained to reporters, "This decision makes it clear that the Obama administration can no longer detain accompanied children for long periods of time in unlicensed, locked-down facilities" (Carcamo 2016).

The state of exception is never complete; it is always tentative in the face of the organic capabilities of subaltern women and children to resist the conditions imposed on them by the homeland security state. The burgeoning Mesoamerican movement and their allies successfully pressured the US government, via the combination of organizing and legal action, to discontinue the policy of denying people bond and to significantly curtail the number of days that people can be held in detention. Bonds, at the time of fieldwork carried out for this study, were an average of \$5000–\$7000 in Texas, an incredibly high amount, especially for a migrant family that has probably already paid a smuggler thousands of dollars. These modest legal victories must be viewed in the context of an ever-evolving and savvy asylum-detention regime. The government later appealed the injunction, and family detention continues to be used to deter asylum seekers. Moreover, the Obama administration continued to invest in the detention infrastructure. In February 2015, the president requested \$41.2 billion for the DHS for FY 2016 (Department of Homeland Security 2015). The budget request earmarked \$3.3 billion for DHS operations; \$691.9 million for care and transportation of unaccompanied children and families; \$373.5 million for customs and border enforcement; \$94.5 million for expanding detention beds for "high risk" people; and \$86.7 million for enhancing the Secret Service.

This buildup of the state's repressive capabilities was quickly put to use to detain and deter refugees. On Christmas Eve, 2015, the Obama administration announced that it would initiate a series of raids to go after former asylum seekers who had lost their cases or who had absconded after receiving a deportation order. The Obama administration's raids, which continued well into 2016, had the function of installing fear in those who had lost their cases, and it sent advocates and leaders in the Central American refugee community into a frenzy to get organized and stop the raids. There were national calls, press releases, social media alerts, and conversations among immigrant families, as raids took place in Maryland, Long Island, Houston, Los Angeles, and other areas with large communities of Central Americans. Most disturbingly, these raids were being proposed by an ostensibly centrist Democratic President, not an ultra-right Republican. Though troubling, Obama's raids were certainly not surprising to those who follow migration control, considering that this same President deported nearly two million people under his administration. Though Obama was certainly hard on migrants and refugees, the Trump Administration is proving to be even harder.

The Trump presidency: Derechos en crisis and authoritarian neoliberalism

The Donald Trump presidency promises to have grave consequences for politics and policy and for questions of race and migration control in general. Perhaps in no other policy realm is this clearer than in migrant and refugee policies. Trump has already sought to expand the power of the homeland security state in significant ways. Not only has he issued a travel ban on seven "Muslim countries," which has recently been reissued after being held up in court; he has also instructed the head of the Department of Homeland Security to issue changes within the agency that greatly expand the apprehension, detention, and prosecutorial powers of the United States government, while weakening the few protections offered to immigrants and refugees.

Trump has accomplished this reconfiguration of the state through the use of two memos published in February of 2017: "Enforcement of the Immigration Laws to Serve the National Interest" and "Implementing the President's Border Security and Immigration Enforcement Improvements Policies" (DHS 2017). The DHS Memos, signed by Secretary Kelly, nullify all previous memos written by the Obama administration, with the exception of DACA, which was addressed by a separate executive action.

"Implementing the President's Border Security and Immigration Enforcement Improvements Policies" calls for the massive expansion of detention facilities and the detention of nearly everyone that is apprehended. An analysis of the American Immigration Lawyers Association (AILA 2017) notes that ICE currently holds 40,000–50,000 people in detention every day. Should Trump be able to realize his enforcement goals, it would likely require the detention of 200,000 people per day (AILA 2017). This will be especially hard on Central American and Mexican asylum seekers, who are sometimes allowed to leave detention on bail or with an ankle bracelet while they wait for their court date when detention space is not available. This memo also calls for an additional 5000 Border Patrol Agents and 500 military personnel to "ensure operational control of the border" (DHS 2017). The memo calls for the immediate construction of the border wall where possible and for a study on completing the wall in areas not immediately accessible. Expedited removal is to be expanded for anyone apprehended anywhere who has been in

the country less than two years, while the previous policy only allowed these summary removals within 100 miles of the border and for people who had been in the United States for less than 14 days. This policy change is particularly damaging to asylum seekers, who could potentially be expeditiously removed and not given an opportunity to present their case before a judge, as called for by the Refugee Convention. The memo also calls for people to appear via satellite for their immigration hearing while in Mexico or Canada. This could mean that asylum seekers from Mexico will no longer be able to be in the United States with a work permit while they wait for their cases to be adjudicated. It suggests a more rigorous Credible Fear Interview process and creates more recourses to detect fraud during the CFI process. The memo expands detention facilities and capabilities near the border, changes the definition of Unaccompanied Alien Children (UAC) so that many currently on the children docket can be tried in regular adult court, and calls for the measures to be taken against the parents of UAC children for “conspiracy to violate our immigration laws” (AILA 2017).

“Enforcement of the Immigration Laws to Serve the National Interest,” in turn, makes critical changes to the enforcement priorities that essentially widen the apprehension net. Rather than focusing on removal priorities as done by the previous administration, DHS now seeks to remove all “removable aliens.” There will essentially be no more prosecutorial discretion (PD), unless approved by the regional DHS leadership on a case-by-case basis. This is especially detrimental for asylum seekers because PD is often the easiest form of relief given to people by judges and government attorneys. Although most asylum seekers would rather be granted asylum, “PD,” as it is known, at least allows people to have the removal proceedings against them canceled. This option virtually no longer exists; all asylum seekers who lose their cases, and who do not have an appeal process in motion, will have a removal order against them.

The “Enforcement of the Immigration Laws to Serve the National Interests” memo also calls for the DHS to expeditiously hire 10,000 new agents, and it creates a Victims of Immigration Crime Engagement (VOICE) unit, which will provide information to the victims of crimes committed by undocumented people. In order to create such a program, the DHS memo rescinds privacy protections for undocumented migrants detained or removed from the United States. The memo seeks to create a public access system that will list individuals’ country of citizenship, the nature of their crime, their potential gang membership status, their detention status, and, if they are released, the time and location of their release. Finally, the memo call for a weekly list to be published by the DHS that will feature information on all migrants released from detention, the location of their release, and the reason for their release.

Trump has also ended Temporary Protective Status (TPS) for El Salvador, Honduras, Haiti, and Nepal. For Central Americans, this essentially means that for 262,000 Salvadorans and 86,600 Hondurans, many who have been here since 1990, will either face deportation proceedings or will have to leave on their own recognizance. Many of these people have been in the United States for almost two decades now, have established lives in the United States, and have US citizen children. Many will likely apply for defense asylum claims because of the country conditions in El Salvador and Honduras, although they will face a more aggressive Executive Office of Immigration Review that has been reconfigured by recent administrations since the “surge” of 2014. Trump’s cancellation of TPS for Salvadorans came just days before his infamous statement behind closed

doors: “Why are we having all of these people from shithole countries come here?” (Weiss 2018). This statement is reflective of the general attitude of the President and his Attorney General, who are closed off to granting asylum to people from a particular constellation of countries that have a history being affected by US militarism and intervention.

In summary, Trump’s policy changes call for the creation of a more powerful deportation regime, the hiring of 10,000 more officers, renewal of deportation programs such as 287G and Secure Communities, and fewer protections for migrants and refugees to pursue discretionary relief and to have rights to privacy. In essence, the memos call for a bigger deportation-detention monster with fewer restraints. The creation of weekly lists to be published are dangerously similar to the lists created by Nazi and Latin American authoritarian regimes, which created lists of terrorists and subversives in order to justify states of exception and to terrorize their enemies, and to please their nationalist base of support.

These are just the beginning of the policy changes that will likely be made to the asylum-detention regime. As harmful as Obama’s policies were for Central American asylum seekers, the Trump administration is doing everything in its power to forge a total state of exception for migrants and refugees. But the move toward a state of exception cannot be reduced to a simple manner of one Democratic administration being slightly worse or slightly better than a Republican administration. This ongoing trend represents a systemic crisis facing the modern liberal states, in which their rights regimes, both domestic and international, are being dismantled by the dialectical project of both neoliberal capitalism and the ultra-right wing backlash against subaltern people in the West writ large. The attempt to impose a state of exception speaks to a deeper and more profound crisis of liberal democracy that preceded both Obama and Trump.

If a basic feature of modern liberalism is the belief that fairness should be inherent in the very structure of society, then we are at a loss to explain why so few Central Americans win their asylum cases. Another element thought to be a cornerstone of liberal democracy is the autonomy of the individual and the existence of an impartial state that respects rights, yet Central Americans’ cases are almost collectively treated as suspect. In reality, Central American asylum seekers, as well as other subaltern groups in the United States, live in a semi-state of exception in which they have limited rights or none at all, and in which their autonomy as individuals is always suspect, for they are most often seen as a racialized group of criminals and terrorists through the gaze of the state and of citizens in civil society.⁶ The asylum-detention regime violates the spirit of international law and the basic constitutional guarantees that supposedly define a modern democracy. It is certainly the case that subaltern peoples in the United States have never enjoyed the rights and privileges of *full* societal membership and citizenship, because of their racialized alterity. However, the history of subaltern groups within the United States is one that has been marked by struggles to secure such rights for Blacks, Latinos, and LGBT people, among other groups. The very struggle of Central American asylum seekers in the 1980 and 90s was one that made some modest gains, such as the closure of certain detention facilities, the ABC settlement, and the Flores settlement.⁷ What makes the last decade especially dangerous is the overt shift in the state’s discourse and practices, which has begun to deny basic rights without apologies or even the semblance of due process in some cases. Even mainstream immigration scholars and judges have begun to question the long-term impact of immigration detention for liberal democracies (Wilsher 2012).

Indeed, the detention of Mesoamerican asylum seekers and efforts to put them in a state of exception point toward an authoritarian turn in contemporary neoliberalism. Theorist Ian Bruff has advanced the concept of *authoritarian neoliberalism* in the context of contemporary Europe to explain this qualitative shift in the mode of governance (Bruff 2014). Bruff refers to a reconfiguration of the state toward a more repressive apparatus, alongside the curtailing of basic civil liberties and rights, to deal with the contradictions of a global capitalist system that has entered a profound crisis. We certainly see this occurring in the United States, with a central difference being that the authoritarian reconfiguration here is intricately linked to our specific racial politics and history. Authoritarian neoliberalism in the US context has been accompanied by a general shift in the politics of race, from a popular and legal discourse of ostensive colorblindness and multiculturalism in the 1990s and early 2000s, to a more authoritarian model of racial governance that unapologetically seeks to roll back rights for racial others, women, members of the LGBT community, and all forms of dissenters. This rollback is especially evident in dismissal of the Refugee Convention, the Flores settlement, TPS, DACA, and other forms of temporary relief under the Trump administration. The United States is at a moment in governance in which genuine white nationalists are appointed to the upper echelons of state power in order to restore the white supremacist racial order, through the combination of both state and mob violence. This shift is seen most clearly in President Donald Trump's proposed appointments and in his promises to use force against Central American women and children, urban Black youth, Mexican migrants, Indigenous environmental activists, and other subaltern communities. Although authoritarian governance was on clear display in the detention of Mesoamerican women and children in 2014, it is regularly practiced throughout the homeland security state – in stop-and-frisk policies in New York, in brutal crackdowns on protests in Ferguson, Baltimore, and Standing Rock, in the ongoing attacks against Black and LGBT communities, and in all other places where a state of exception is attempted upon subaltern bodies. Authoritarian neoliberalism relies less on the consent of the subaltern and more on force and domination.

As daunting as the times are before us, we must recognize that the authoritarian shift is not inevitable. Rather, as Gramsci (1971) reminds us, all political configurations are a product of struggle and hence could be changed. Indeed, asylum and detention policies are a product of struggle among groups with different values, interests, and conceptions of the world. It may be true that the forces that push for anti-refugee policies operate at the highest echelons of the state–civil society nexus. But it is equally true that refugees are not idle objects of history, despite their subaltern existence. They are subjects of history who have time and time again acted as a moral force that creates change – even if minor – in the face of the authoritarian turn in contemporary neoliberalism. This power was evident in the 2014 hunger strike, and it will continue to be the role of refugees and their allies in the near future. In fact, in August of 2016, a group of women and children in Berks County Family Detention Center in Pennsylvania launched another hunger-work strike to demand their freedom and to protest their prolonged detention, despite the Department of Homeland Security's claim that it would curtail detention to less than 20 days in most cases. Detainees in Adelanto, California, also launched a series of hunger strikes to protest physical, psychological, and sexual violence from guards (Pierre 2017). Even along the migrant trail, some of the subaltern groups among Central American refugees, such as transgender migrants and asylum seekers, are asserting their resistance in the

face of new forms of confinement and policing (Balaguera 2018). As of this writing, a large Caravan of Central Americans organized by a group called *Pueblos Sin Fronteras* (People Without Borders) are crossing through Mexico with the intention of applying for asylum in the United States. The Trump Administration has responded by deploying national guard troops to the border, criminalizing the caravan by calling it an invasion, and looking for ways to detain these individuals in military facilities if necessary.

Draconian as such policies may be, we must not forget that the semi-state of exception did not start with Obama or Trump. Agamben reminds us that exception has been a constant feature of so-called liberal democracies. Indeed, he notes that the Nazis did not start the state of exception in Germany; they simply used the emergency laws that already existed under the Weimar Republic to tighten their grip on society. Trump has ascended onto a state apparatus that was built on violence against subaltern peoples from its very inception through a settler colonial state and that has been restructured over the last 35 years to police, incarcerate, deport, control, intimidate, and spy with greater efficiency. What is unique and dangerous about this moment, however, is that Trump is wielding the power of a state that has systematically and relentlessly sought to cut away the legal safety nets that were put in place by real struggles by subalterns in their elusive quest for rights. As problematic and elusive as they have always been, the Bill of Rights, the Universal Declaration of Human Rights, and the 1951 Refugee Convention, and other great rights documents, are in danger of being suspended and becoming even more meaningless in the face of authoritarian neoliberalism. This is precisely why refugee rights – and all of our rights for that matter – are in crisis. It is also why during these dark times, we must draw inspiration from the valiant women at Karnes, and other subaltern actors, to resist efforts to lock us into a real and total state of exception.

Notes

1. The five protected grounds are race, religion, nationality, membership in a particular social group, or political opinion.
2. ICE has changed the name to Karnes County Residential Center.
3. Kathleen Arnold (2011) uses Agamben and Foucault to analyze immigration policy, and Paul Apostolidis (2010) has used Foucault with Gramsci to understand migrant worker organizing. Nonetheless, we must recognize that there is a theoretical tension in using Gramsci along with Agamben, in that the former is a Marxist who views the taking of state power and the destruction of capital as the solution to the problem of subaltern or oppressed groups, and the latter is a post-structuralist who believes that the destruction of state sovereign is the only way forward. It goes beyond the scope of this paper to resolve this tension; I simply want to recognize it and move on.
4. For more on intersectionality and immigration enforcement see Anna Sampaio (2015) who argues that migration enforcement operates through the intersection of race, gender, class, sexuality, and other markers of difference and reproduces unequal treatment along these lines.
5. People who have a history of violating parole or consistently missing court dates are considered a flight risk, as are people with no job, no family ties, and/or no children in the United States.
6. I want to thank my colleague Anthony Jerry for helping me see this inherent contradiction in liberalism through our conversations.
7. The ABC settlement refers to the 1985 class action suit filed by the American Baptist Churches against the Reagan Administration; it resulted in 70,000 Central American being

able to have their cases heard “denovo”, or to have a second hearing after it was determined that first hearing was held under unfair conditions.

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